



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

December 5, 1997

Mr. David Anderson
Chief Counsel
Texas Education Agency
1701 N. Congress
Austin, Texas 78701-1494

OR97-2644

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 110648.

The Texas Education Agency (the "agency") received a request for "each of the proposals submitted in response to Request for Proposal No. 701-97-021, ("RFP 701-97-021") except for the proposal submitted by (the requestor)," as well as other information related to the awarding of contracts for Special Education Hearing Officers for Due Process Hearings Brought Under the Individuals with Disabilities Education Act, as amended by the Individuals with Disabilities Education Act Amendments of 1997. You state that the agency will produce some information responsive to the request, but assert that the remaining information is excepted from disclosure pursuant to sections 552.024, 552.101, 552.110 and 552.117 of the Government Code. We have considered your arguments and have reviewed the information submitted.

Pursuant to section 552.301(b), a governmental body is required to submit to this office (1) general written comments stating the reasons why the stated exceptions apply that would allow the information to be withheld, (2) a copy of the written request for information, and (3) a copy of the specific information requested or representative samples, labeled to indicate which exceptions apply to which parts of the documents. You submitted to this office only representative samples of the specific information that was requested.

Pursuant to section 552.303(c) of the Government Code, this office notified you by letter dated November 13, 1997 that we needed all of the copies of proposals submitted to the agency in response to RFP 701-97-021 in order to address the exceptions to disclosure which you had claimed. On November 21, 1997, your office informed this office by phone and letter that the agency intended to release all of the requested information except that related to the original two sample proposals submitted to this office.

By letter dated November 25, 1997, you informed this office that a third individual whose proposal is responsive to the request seeks to prevent disclosure of her proposal. As provided by section 552.303(e), the information related to the proposal of the third individual is presumed to be public information as you did not provide this information to this office within the seven-day period. Information that is presumed public must be released unless a governmental body demonstrates a compelling interest to withhold the information to overcome this presumption. See *Hancock v. State Bd. of Ins.*, 797 S.W.2d 379, 381-82 (Tex. App.--Austin 1990, no writ) (governmental body must make compelling demonstration to overcome presumption of openness pursuant to statutory predecessor to Gov't Code § 552.302); Open Records Decision No. 319 (1982).

Where information is made confidential by other law or where third party interests are at issue, a compelling reason exists to overcome the presumption that information is open under section 552.303(e). See Open Records Decision No. 150 (1977). We will therefore address the arguments against disclosure for this proposal, as well as the original two proposals submitted for our review.¹

Pursuant to section 552.305 of the Government Code, we notified the individuals who submitted proposals in response to RFP 701-97-021 of the request for information and of their opportunity to claim that the information at issue is excepted from disclosure. We received response from all three individuals whose records were submitted to our office for review.²

Dr. James N. Hollis responded by asserting that his tax return information is confidential by law. We agree. Federal tax return information, including taxpayer identification numbers, are confidential under federal law. 26 U.S.C. § 6103(a). Therefore, the agency must withhold the federal tax return information submitted by Dr. Hollis.

In addition, you raise section 552.101 to protect information in a letter submitted to the agency by Dr. Hollis' attorney regarding his financial stability. Section 552.101 excepts from required public disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision and incorporates the doctrine of common-law privacy. For information to be protected from public disclosure under the common-law right of privacy, the information must meet the criteria set out in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. This office has found that personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure under constitutional or common-law privacy. See Open Records Decision Nos. 600 (1992), 545 (1990). We have marked the information pertaining to Dr. Hollis' financial condition that may be withheld under section 552.101. (See green tag).

¹We also received a response from one individual whose proposal you did not submit to our office for review. We caution that, pursuant to section 552.352 of the Government Code, release of information in the requested proposals that you have not submitted for our review which is confidential by law could result in criminal penalties.

²These individuals are Dr. James N. Hollis, Ms. Evelyn Conner Hicks and Ms. Karen Hensley Meinardus.

Ms. Hicks responded by asserting that a financial statement for the law Offices of Donald W. Hicks, Sr., P.C. submitted in response to the request for proposal is protected under sections 552.101 and 552.110. Ms. Meinardus also argued that financial information submitted as part of her response to RFP 701-97-021 is excepted section 552.110 as well as under a right of privacy.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets and (2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. Commercial or financial information is excepted from disclosure under the second prong of section 552.110. In Open Records Decision No. 639 (1996), this office announced that it would follow the federal courts' interpretation of exemption 4 to the federal Freedom of Information Act when applying the second prong of section 552.110. In *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974), the court concluded that for information to be excepted under exemption 4 to the Freedom of Information Act, disclosure of the requested information must be likely either to (1) impair the Government's ability to obtain necessary information in the future, or (2) cause substantial harm to the competitive position of the person from whom the information was obtained. *Id.* at 770.

"To prove substantial competitive harm, the party seeking to prevent disclosure must show by specific factual or evidentiary material, not conclusory or generalized allegations, that it actually faces competition and that substantial competitive injury would likely result from disclosure." *Sharyland Water Supply Corp. v. Block*, 755 F.2d 397, 399 (5th Cir.), *cert. denied*, 471 U.S. 1137 (1985) (footnotes omitted).

Upon review of the arguments submitted by Ms. Hicks and Ms. Meinardus, we conclude that neither has demonstrated by specific factual or evidentiary material how release of the requested financial statements would cause substantial competitive harm, and thus, the financial statements may not be withheld from disclosure pursuant to section 552.110.

With regard to whether the financial statement may be withheld pursuant to section 552.101, we note Ms. Hicks' assertion that the financial statement was submitted to the agency in response to the request for proposal as an individual proposer, not as the corporate entity. However, as the information pertains to a corporate entity, we conclude it may not be withheld under section 552.101 in conjunction with common law privacy. Open Records Decision No. 600 (1992)(corporation or business entity may not claim common law privacy). The financial statement for the law Offices of Donald W. Hicks, Sr., P.C. must therefore be released to the requestor.

Upon review of the profit-loss statement and balance sheet submitted by Ms. Meinardus, we are unable to determine whether Ms. Meinardus is operating her legal practice as a corporate entity. If so, the information may not be withheld under a right of privacy. Open Records Decision No. 600 (1992). If her legal practice is not incorporated, we conclude this information is personal financial information not relating to a financial transaction between Ms. Meinardus and a governmental body and therefore, this information must be withheld from the requestor pursuant to section 552.101 and common-law privacy. *See* Open Records Decision Nos. 523 (1989) (credit reports, financial statements, and financial information regarding an individual applicant for the veterans' land program are excepted by common law privacy), 373 (1983) (common-law privacy protects assets

and income source information); *see also* Open Records Decision Nos. 600 (1992), 545 (1990) (personal financial information not relating to the financial transaction between an individual and a governmental body is excepted from required public disclosure).

We next address your argument under section 552.117 of the Government Code. Section 552.117 excepts from public disclosure information relating to the home address, home telephone number, and social security number of a current or former government employee or official, as well as information revealing whether that employee or official has family members. Section 552.117 requires you to withhold this information for an official, employee, or former employee who requested that this information be kept confidential under section 552.024. *See* Open Records Decision Nos. 622 (1994), 455 (1987). You state, "because of the nature of their occupations, §552.024, §552.101 and §552.117 may not address the proposers' addresses and telephone numbers. However, those sections may except their social security numbers and federal employer identification numbers from public disclosure because they are part of the proposers' financial documentation" As it does not appear that Ms. Hicks, Ms. Meinardus or Dr. Hollis are agency employees, we conclude you may not withhold their addresses or social security numbers under section 552.117.

However, we note that a social security number is excepted from required public disclosure under section 552.101 in conjunction with the 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), if it was obtained or is maintained by a governmental body pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). We are unable to determine whether the social security numbers are confidential under this federal statute. We note, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,



Michael A. Pearle
Assistant Attorney General
Open Records Division

MAP/ch

Ref.: ID# 110648

Enclosures: Marked documents

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